IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 30, 2007 Session

STATE OF TENNESSEE v. ABBY RENEE DUGGAN

Appeal from the Criminal Court for Knox County
No. 84704, 84705 Jerry Scott, Judge, Sitting by Designation

No. E2007-00336-CCA-R3-CD - Filed January 30, 2008

The Appellant, Abby Renee Duggan, appeals the judgment of the Knox County Criminal Court ordering sentences of confinement. Duggan's effective six-year sentence of confinement stems from her guilty pleas to two counts of robbery and one count of fraudulent use of a credit card. Following a sentencing hearing, the trial court denied all forms of alternative sentencing and ordered confinement in the Department of Correction. Duggan appeals this ruling, arguing that the trial court erred in denying "probation and alternative sentencing." After *de novo* review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Tommy K. Hindman, Knoxville, Tennessee, for the Appellant, Abby Renee Duggan.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip Morton, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On June 20, 2006, a Knox County grand jury indicted the Appellant in two separate cases. In Case No. 84704, the Appellant was indicted for the robbery of Helen Payton; and, in Case No. 84705, for the aggravated robbery of Darlene Dagnan and two counts of fraudulent use of a credit/debit card. The charges stemmed from two separate incidents, occurring on April 5 and 6, 2006, in which the Appellant forcefully took the purses of the victims as they returned to their vehicles after shopping.

On December 4, 2006, the Appellant, pursuant to the terms of a plea agreement, pled guilty to robbery, a Class C felony, in Case No. 84704. In Case No. 84705, the Appellant pled guilty to robbery, as a lesser-included offense of aggravated robbery, and to fraudulent use of a credit card, a Class A misdemeanor. The plea agreement provided that the State would recommend six-year sentences for each robbery conviction and that the Appellant would be sentenced as a Range I, standard offender. The agreement further provided that the six-year sentences would be served concurrently to each other, as well as to the sentence of eleven months and twenty-nine days for the Class A misdemeanor, resulting in an effective sentence of six years. The plea agreement specified that the manner of service of the sentences would be submitted to the trial court for determination.

On January 18, 2007, the trial court held a sentencing hearing at which one of the victims, Ms. Dagnan, who was sixty-one years old, testified regarding her encounter with the Appellant on April 6, 2006:

> And I was at Turkey Creek Shopping Center during the day, and I returned to my car which was two doors from the front door. . . . And when I turned my back to go to my car door, I felt a extreme pain come through my chest. And I thought it was my heart. So I clung to myself and had it happen again. This time only to be slung around into the chest of this woman, at which time she slammed me against a van, leaned her body weight upon me, and as I watched helplessly as she drew back with all of her might and hit me in the side of the face. She never spoke a word. I could not see around her or over her. However, I did get to look up and we were face to face. . . . She began to beat me and never said what she wanted. . . .
>
> She then drug me out into the driving area. She drug me out of my shoes and continued to beat me.
>
> . . . .
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> She did not know that I was only six months out of three foot surgeries and had a steel plate in my foot. And she stomped with all of her might on my foot, at which time I just felt sick and weak. And then she took my purse and got it – finally got it off of me. Had she asked, I would have given it to her. . . . And that was the attack. She did get my purse and everything included.
>
> I was injured. I was cut and bruised and my foot was very swollen, of course. I did – I do have a broke back that could not be fixed. So my back was injured. . . . She got the keys to my home, and my car keys and all.
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> . . . .
>
> . . . I did not return at all to work for two weeks . . . . I made a list of things that were taken from me. Purse, my bank account was cleaned out.

Ms. Dagnan further testified that she is self-employed as a home "designer" and lost considerable earnings as a result of her inability to work. Moreover, she stated that she still struggles emotionally and became depressed as a result of her victimization. She explained:

> . . . So I'm not the person I was before. I am afraid in parking lots . . . . I have no hospitalization. [As a result of this crime,] . . . bills have been turned over to credit [collection agencies]. My credit has suffered. . . .[1] I just want this woman to understand what she's done to my life . . . .

The second victim, Ms. Payton, did not appear at the sentencing hearing but submitted a victim impact statement that was included in the pre-sentence report. The pre-sentence report states that on April 5, 2006, Ms. Payton had been sitting in her vehicle outside a Wal-Mart store when the Appellant reached through the window and took her purse, despite Ms. Payton's initial reluctance to relinquish it. In her victim impact statement, Ms. Payton related:

> It has made me afraid to leave work after dark. I do not go places by myself. I have panic attacks. It has caused me to have numerous hospital and doctor bills. I no longer feel safe. It has put a burden on my family members. They had to take me to work.

The Appellant did not testify at the sentencing hearing, but the pre-sentence report establishes that the twenty-seven-year-old Appellant resides with her three-year-old son in a mobile home in Lenoir City. The Appellant is married to Joe Duggan, who is incarcerated in the Department of Correction. The Appellant also has three other children from a former relationship, but her parental rights to these children have been terminated. The father of these three children is also an inmate in the state penitentiary. The Appellant began working for her father, who owns Twin Lake Materials, approximately five months prior to her sentencing hearing. The Appellant's criminal history reflects a single misdemeanor offense for driving on a suspended license.

The pre-sentence report also includes the following history of drug abuse as reported by the Appellant:

> . . . The [Appellant] . . . started using marijuana at age fourteen. Her most recent use of the drug occurred in May of 2006. The [Appellant] reported using the drug on a daily basis from age fourteen to age twenty-seven. The [Appellant] started using cocaine at age nineteen. She reported using the substance on a daily basis for approximately two years prior to her arrest for the instant offenses. The [Appellant] reported using oxycontin and/or hydrocodone on a daily basis for six years prior to

[1] This victim reported the loss of ten credit cards, which resulted in numerous late payment charges, in addition to numerous other miscellaneous expenses directly related to identity theft. The State estimated restitution at $6,200, not including lost wages.

her arrest for the instant offenses. The [Appellant] is in a methadone treatment program at Volunteer Treatment Center in Chattanooga . . . .

In her statement to the pre-sentence officer, the Appellant explained that she committed the crimes because, "I needed money for drugs."

Following the sentencing hearing, the trial court denied probation and ordered that the Appellant serve her effective six-year sentence in the Department of Correction. The Appellant timely appealed the sentencing decision to this court.

Analysis

A defendant who challenges his or her sentence has the burden of proving the sentence imposed by the trial court is improper. T.C.A. § 40-35-401 (2006); Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). It is this court's duty to conduct a *de novo* review of the record with a presumption that the trial court's determinations are correct when a defendant appeals the length, range, or manner of service of his or her sentence. T.C.A. § 40-35-401(d). The presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). In this case, the record makes no such showing. Accordingly, we do not apply the presumption.

The Appellant submits for our review the sole issue of whether the trial court erred in denying her probation or another form of alternative sentencing. The Appellant contends that the trial court did not acknowledge that she was entitled to the statutory presumption of being a favorable candidate for alternative sentencing and that the trial court did not make the findings required to rebut this presumption or explain its basis for ordering a sentence of confinement. The Appellant also asserts that the trial court did not consider any of her alleged positive steps at rehabilitation in reaching its decision. The State argues that the Appellant has effectively waived this issue, as her failure to include the transcript of the guilty plea hearing in the record prohibits a meaningful review of the sentence. Alternatively, the State urges us to affirm the sentence imposed by the trial court, based upon the circumstances of the offense as established by the record.

A defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2006). In this case, because the Appellant was convicted of two Class C felonies, entitlement to the presumption of alternative

sentencing is afforded.[2] The following considerations provide guidance regarding what constitutes "evidence to the contrary" to rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1) (2006); *see also State v. Hooper*, 29 S.W.3d 1, 5 (Tenn. 2000). Because the Appellant has only one prior conviction, subsections (A) and (C) are not applicable to rebut the presumption.

When a challenge is made to the manner of service of a sentence, it is the duty of the appellate court to conduct a *de novo* review of: (1) the evidence, if any, received at trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and the characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, and -210 (2006). In addition, the trial court should consider the circumstances of the offense, the defendant's criminal record, social history, and present condition, as well as the deterrent effect upon and best interest of the defendant and the public. *State v. Smith*, 662 S.W.2d 588, 589 (Tenn. 1983).

In the present case, the State presented evidence establishing the vulnerability of the sixty-year-old victim as a result of her surgeries, the emotional trauma inflicted upon both victims, and the physical beating of Ms. Dagnan, which the trial court characterized as "violent." Additionally, the record establishes the substantial monetary loss incurred by Ms. Dagnan. The Appellant explains her actions by simply stating, "I needed money for drugs." Lack of remorse is relevant when considering a defendant's potential for rehabilitation and sentencing alternative. T.C.A. § 40-35-103(5). Moreover, the sentencing court is not required to ignore the fact that the Appellant's unlawful conduct involved two criminal episodes committed on separate dates resulting in three separate crimes.

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[2] We would agree with the Appellant's argument that the trial court's reasons for denying alternative sentencing failed to reflect the required sentencing considerations of subsections 103(1) (A), (B), or (C). In denying probation, the trial court stated: "This is a violent offense and this lady [Ms. Dagnan] has been hurt. . . . I just don't think this is an appropriate case for probation." Accordingly, our review is *de novo.*

The particular nature and circumstances of these crimes, as developed by the facts, are offensive and clearly excessive in view of the resulting consequences. Based upon the proof presented and the unique circumstances of these cases, we conclude that the State has presented sufficient "evidence to the contrary" to rebut the presumption favoring an alternative sentencing option. Accordingly, following *de novo* review, we conclude that the Appellant is not an appropriate candidate for alternative sentencing.

CONCLUSION

Based upon the foregoing, the judgments of the Knox County Criminal Court are affirmed.

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DAVID G. HAYES, JUDGE